

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Accounting Safeguards)	
Under the Telecommunications Act of 1996:)	CC Docket No. 96-150
)	
Section 272(d) Biennial Audit Procedures)	

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 2002

Released: September 5, 2002

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we deny SBC Communications Inc.'s (SBC) request for confidential treatment of information contained in its audit report submitted under section 272(d) of the Communications Act of 1934, as amended (the Act).¹ In particular, we reject SBC's arguments that information contained in its audit report is protected by the Commission's confidentiality rules.

2. Section 272 establishes certain structural, transactional, and nondiscrimination safeguards that govern the relationship between a Bell Operating Company (BOC) and its affiliate after the BOC receives authorization for providing in-region interLATA telecommunications services pursuant to section 271 of the Act.² Section 272(d) requires a BOC, after receiving section 271 authorization, to obtain a joint Federal/State audit conducted by an independent auditor to determine whether the BOC complies with section 272 and the Commission's implementing rules.³

3. In a series of orders, the Commission implemented the separate affiliate safeguards mandated by the statute.⁴ These regulations are intended to deter conduct that would furnish an unfair

¹ See 47 U.S.C. § 272(d).

² The Commission considers a BOC's compliance with section 272 during the section 271 application process. See, e.g., *Application of Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶¶ 401-21 (1999) (subsequent history omitted).

³ See 47 U.S.C. § 272(d); 47 C.F.R. § 53.209.

⁴ See *Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17359 (1996) (*Accounting Safeguards Order*), Second Order on Reconsideration, 15 FCC Rcd 1161 (2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999); see also 47 C.F.R. §§ 32.27, 53.1-53.213, 64.901-64.904.

competitive advantage to a BOC's newly established in-region interLATA operations over other carriers, such as cost misallocation or discrimination in favor of the BOC's section 272 affiliate.⁵ In the *Accounting Safeguards Order*, the Commission established requirements governing the conduct of the section 272(d) biennial audit, the oversight of the independent auditor, and the filing of the audit report.⁶ The audit staff of the Common Carrier Bureau (now the Wireline Competition Bureau) and participating state commissions subsequently developed the general audit program in conjunction with the BOCs and other interested parties. The general audit program has been publicly available since 1997.⁷

4. On December 17, 2001, SBC submitted its first section 272(d) biennial audit report. Consistent with relevant auditing standards, the "final audit report" provides facts concerning the compliance of several SBC affiliates that provided in-region interLATA telecommunications in Texas pursuant to SBC's section 271 authorization.⁸ The final audit report also contains information regarding SBC's in-region interLATA telecommunications operations in Kansas, Oklahoma, and the former Ameritech region. With its submission, SBC requested confidential treatment for information on thirty-nine of ninety-three pages in the final audit report.⁹ Thus, SBC submitted two versions of its section 272(d) final audit report: (1) a publicly available report with redactions (SBC Redacted Section 272 Audit Report); and (2) a version submitted under seal.

5. On January 10, 2002, the Commission issued the *Section 272(d) Audit Order* denying Verizon's request for confidential treatment of its section 272(d) audit information based on section 272(d)(2)'s requirement that "the audit results be made public."¹⁰ The Commission also found disclosure consistent with the audit provisions of section 220 of the Act, the Trade Secrets Act, and Exemption 4 of the Freedom of Information Act.¹¹

6. On February 12, 2002, AT&T Corporation (AT&T) requested access to SBC's redacted audit information, citing the *Section 272(d) Audit Order*.¹² On March 19, 2002, SBC filed a response to AT&T's request.¹³ On April 9, 2002, the Commission denied Verizon's petition for stay and petition for reconsideration of the *Section 272(d) Audit Order*.¹⁴ On July 30, 2002, the Competitive

⁵ See *Accounting Safeguards Order* at ¶ 13; see also *Non-Accounting Safeguards Order* at ¶¶ 15-16.

⁶ See 47 C.F.R. §§ 53.209-213; see *Accounting Safeguards Order* at ¶¶ 197-205.

⁷ See *Proposed Model for Preliminary Biennial Audit Requirements*, Public Notice, 12 FCC Rcd 13132 (1997) (*Proposed Model Biennial Audit Requirements*).

⁸ By "final audit report," we mean the report submitted on December 17, 2001.

⁹ See Letter from Anu Seam, Senior Counsel, SBC, to Magalie Salas, Secretary, Federal Communications Commission (Dec. 17, 2001) (*SBC December 17, 2001 Confidentiality Request*). Thus, SBC redacted information on 42 percent of the pages in the final audit report (excluding the title and table of contents pages). By comparison, Verizon redacted information on twenty-eight of eighty-seven pages in its section 272 audit report, or 32 percent. See *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272 Biennial Audit Procedures*, CC Docket No. 96-150, Memorandum Opinion and Order, 17 FCC Rcd 1374, 1375, at ¶ 4 (2002) (*Section 272(d) Audit Order*).

¹⁰ See *Section 272(d) Audit Order*, 17 FCC Rcd at 1375-76, ¶¶ 5-6.

¹¹ *Id.* at ¶ 13.

¹² Letter from Joan Marsh, Director, Federal Government Affairs, AT&T Corporation to Magalie Roman Salas, Secretary, Federal Communications Commission (Feb. 12, 2002) (*AT&T February 12, 2002 Letter*).

¹³ Letter from Michelle Thomas, Executive Director – Federal Regulatory, SBC, to William F. Caton, Acting Secretary, Federal Communications Commission (Mar. 19, 2002) (*SBC March 19, 2002 Supplemental Confidentiality Request*).

¹⁴ See *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272 Biennial Audit Procedures*, CC Docket No. 96-150, Order on Reconsideration, 2002 WL 534612, FCC 02-111 (rel. Apr. 11, 2002) (*Section 272(d) Audit Order on Reconsideration*).

Telecommunications Association (CompTel) also requested access to SBC's redacted audit information.¹⁵

II. DISCUSSION

7. Pursuant to section 0.459 of the Commission's rules, we deny SBC's request for confidentiality of the information contained in its final section 272(d) audit report. Specifically, we find that release of the audit information (1) will not impair the flow of audit information in the future; (2) will not cause SBC substantial competitive harm; and (3) will serve the public interest.¹⁶

A. Section 272(d) Audit Order

8. We concluded in the *Section 272(d) Audit Order* that the plain language and purpose of section 272 require disclosure of a BOC's section 272 audit report.¹⁷ We relied on section 272(d)(2), which requires the independent auditor to "submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection."¹⁸ We further noted that the purpose of the audit report is to assist the Commission, the state commissions, and the public in evaluating a BOC's compliance with the section 272 separate affiliate requirements.¹⁹ We also rejected Verizon's claim that the Commission's confidentiality rules protected Verizon's section 272 audit results from release.²⁰ Specifically, we found that Verizon's audit results were at a summary, not detailed, level,²¹ were otherwise required to be disclosed, and were dated.²² We therefore concluded that release of Verizon's audit information was compelled by both section 272(d)(2) of the Act and consistent with the Commission's confidentiality rules.

9. SBC argues here that our conclusion in the *Section 272(d) Audit Order* to release Verizon's audit results should not apply to its section 272(d) audit because, *inter alia*, its audit program contemplates a right to request confidential treatment of certain audit information. According to SBC, because the audit program stated a process for SBC to request confidential treatment pursuant to section 0.459 of the Commission's rules, the Commission cannot under section 272(d)(2) release information SBC claims is confidential. SBC confuses the confidentiality request procedure contemplated in the audit program with an entitlement to confidential treatment. As explained in detail below, SBC has requested confidential treatment of information contained in the audit report. SBC based its request on section 0.459 of the Commission's rules, and as explained below, we deny SBC's request and order release on those grounds.

¹⁵ Letter from H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, Federal Communications Commission (July 30, 2002).

¹⁶ As explained below, we do not require disclosure of certain irrelevant information relating to the names of specific customers and vendors. See ¶ 32, *infra*.

¹⁷ See *Section 272(d) Audit Order*, 17 FCC Rcd at 1375-77, ¶¶ 5-8.

¹⁸ 47 U.S.C. § 272(d) (2).

¹⁹ See *Section 272(d) Audit Order*, 17 FCC Rcd at 1376-77, ¶ 7; *Accounting Safeguards Order* at ¶ 197 (concluding that the purpose of the section 272(d) audit is to determine whether the BOCs and their separate affiliates are complying with the section 272 requirements); *Non-Accounting Safeguards Order* at ¶ 323 (stating that the "broad audit requirement is intended to verify BOC compliance with the accounting and non-accounting requirements").

²⁰ See *Section 272(d) Audit Order*, 17 FCC Rcd at 1380-83, ¶¶ 13-20.

²¹ See *id.* at 1381-82, ¶ 16.

²² See *id.* at 1381-82, ¶¶ 16-19.

B. The Commission's Confidentiality Rules

10. The Commission's confidentiality rules regarding requests for information are contained in section 0.459.²³ We base confidentiality determinations under section 0.459 on Exemption 4 of the FOIA, which permits us to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."²⁴ Exemption 4 protects trade secrets and commercial or financial information obtained from a person that are privileged or confidential.²⁵ The tests for confidentiality are contained in two seminal cases, *National Parks* and *Critical Mass*.²⁶ If the submitter was obligated to furnish the information at issue, *National Parks* provides the analytical framework to determine if the information is confidential.²⁷ If the agency determines that the information was submitted voluntarily, *Critical Mass* governs.²⁸ Under *Critical Mass*, information is confidential if the information is not "customarily" disclosed to the public by the submitter.²⁹ Under *National Parks*, information is confidential (and thus exempt from disclosure) if (1) release of the information would impair the agency's ability to get the information in the future or (2) release of the information would cause the submitter substantial competitive harm.³⁰ In addition, the Commission has traditionally declined to release audit information unless it determines that release would serve the public interest.³¹

11. The Commission's rules place on the submitter the responsibility to explain the degree to which the information is commercially sensitive (or contains trade secrets) and the manner in which the subject data could be used by competitors to inflict substantial competitive harm.³² Among other things, the submitter must explain how disclosure could result in substantial competitive harm;³³ identify any measures taken to prevent unauthorized disclosure;³⁴ and identify whether the information is available to the public and the extent of any previous disclosure of the information to third parties.³⁵ The Commission's rules prohibit consideration of "casual requests" for confidential treatment that do not comply with these requirements.³⁶

²³ 47 C.F.R. § 0.459.

²⁴ 5 U.S.C. § 552(b)(4); *Section 272(d) Audit Order*, 17 FCC Rcd at 1380, ¶ 13.

²⁵ See, e.g., *Gulf & Western Indus. v. United States*. For purposes of this order, we assume the commercial or financial and "from a person" requirements are met. Our analysis will focus on the "confidential or proprietary" prong.

²⁶ See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*); *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (*Critical Mass*).

²⁷ See *Critical Mass*, 975 F.2d at 880.

²⁸ See *Critical Mass*, 975 F.2d at 879.

²⁹ *Critical Mass*, 975 F.2d at 879.

³⁰ *National Parks*, 498 F.2d at 770.

³¹ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 at ¶ 53 (1998) (*Confidential Treatment Policy*), *Order on Reconsideration*, 14 FCC Rcd 20128 (1999).

³² See 47 C.F.R. §§ 0.459(b)(3), (b)(5).

³³ See 47 C.F.R. § 0.459(b)(5).

³⁴ See 47 C.F.R. § 0.459(b)(6).

³⁵ See 47 C.F.R. § 0.459(b)(7).

³⁶ *Id.* at § 0.459(c).

1. SBC's Confidentiality Request

12. On December 17, 2001, SBC requested confidential treatment for information on 39 pages of its section 272(d) audit report.³⁷ On March 19, 2002, SBC supplemented its request for confidential treatment.³⁸ In its requests, SBC generally argues that, pursuant to the impairment prong of *National Parks*, the redacted portions of the section 272(d) audit report are exempt from disclosure.³⁹ In particular, SBC argues that disclosure of the information at issue would impair the Commission's ability to obtain information through the audit process. SBC states that, if disclosure is required here, it "certainly will not willingly agree to any procedures in future audits that would include confidential proprietary information in the audit report."⁴⁰ SBC further argues that the redacted information should be treated confidentially because it is competitively sensitive,⁴¹ and because release of certain information would pose a "security risk."⁴² Finally, SBC contends that the redacted information is not relevant for evaluating SBC's compliance with section 272 and the Commission's implementing rules.⁴³ For the reasons explained below, we deny SBC's request for confidential treatment pursuant to section 0.459 of the Commission's rules.

C. Findings

13. As an initial matter, we find that SBC's section 272(d) audit report is a required submission for purposes of our analysis here. Section 272(d) requires each BOC to obtain an audit of its compliance with the accounting and non-accounting safeguards contained in section 272 and the Commission's implementing rules.⁴⁴ Under section 272(d)(2) and the Commission's rules, the BOC must submit the final section 272(d) audit report to the Commission and the state commissions for the BOC's region according to a specific schedule. We therefore find that the *National Parks* two-prong test must be applied here, *i.e.*, we must determine whether disclosure of the redacted information would impair our ability to get the information in the future or would cause SBC substantial competitive harm.⁴⁵

14. We reject SBC's argument that disclosure of the information in the section 272(d) audit report would impair the Commission's ability to obtain comparable information in future audits. Despite SBC's suggestion, we believe that all BOCs will comply with this statutory audit requirement until this requirement sunsets.⁴⁶ Indeed, section 272(d)(3) expressly grants the Commission, the state commissions, and the independent auditor access to "the financial accounts and records" of the BOC and its affiliates for the purposes of the audit.⁴⁷ Because the section 272(d) audit is "a joint Federal/State audit . . .

³⁷ See *SBC December 17, 2001 Confidentiality Request*.

³⁸ See *SBC March 19, 2002 Supplemental Confidentiality Request*.

³⁹ See *SBC December 17, 2001 Confidentiality Request* at 3.

⁴⁰ See *SBC March 19, 2002 Supplemental Confidentiality Request* at 8. SBC also states that it will not "willingly agree to include additional information not specifically necessary to assess compliance with the relevant requirements." *Id.*

⁴¹ See *SBC December 17, 2001 Confidentiality Request* at 3-4.

⁴² See *SBC March 19, 2002 Supplemental Confidentiality Request* at A-6.

⁴³ *Id.* at 1.

⁴⁴ 47 U.S.C. § 272(d); see 47 C.F.R. § 53.209-.213.

⁴⁵ See n. 30 *supra*.

⁴⁶ The Commission is currently considering whether to sunset section 272's structural separation and related requirements. See *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Notice of Proposed Rulemaking, FCC 02-148 (rel. May 24, 2002) (*Separate Affiliate Sunset NPRM*).

⁴⁷ 47 U.S.C. § 272(d)(3).

conducted by an independent auditor,” the joint Federal/State audit team and the independent auditor determine what information is necessary to evaluate the BOC’s compliance. Failing to comply with the section 272(d) audit requirement by, for example, refusing to furnish information, would be an extremely serious matter that would subject SBC to a range of potential enforcement actions.

15. As explained below, we also conclude that disclosure of the information at issue is not likely to cause SBC substantial competitive harm. As with the Verizon case, the information SBC seeks to protect is aggregated, both geographically and by transaction, already publicly available elsewhere, and dated.⁴⁸ Specifically, SBC’s information does not provide competitors insight into SBC’s or SBC’s affiliates’ strategies in individual markets. The Commission’s confidentiality decisions for audit information have often turned on whether the information is at a summary level or is detailed because summary information is much less likely to cause competitive harm.⁴⁹ Further, the report does not disclose individual transactions or customer information.⁵⁰ Finally, we note that our decision here is reinforced by the fact that the information is arguably of limited use because it is greater than 12 months old, mitigating the likelihood of substantial competitive harm.⁵¹

16. SBC asks for confidential treatment of three categories of information: (i) financial and accounting information; (ii) performance data depicting SBC’s quality of service for certain telecommunications services; and (iii) other commercial information. We address SBC’s request for confidential treatment of each category below.

(i) Financial/Accounting Information

17. SBC requests confidential treatment for nearly all financial and accounting information contained in the section 272(d) audit report. In particular, SBC seeks confidential treatment for the dollar value of the fixed asset listings for its section 272 affiliates (both in total and for switching and transmission facilities of SBC’s section 272 affiliates),⁵² the accounts payable from the section 272 affiliates to the SBC BOCs;⁵³ the dollar value of an asset transfer from an SBC BOC to a section 272 affiliate;⁵⁴ the dollar value of services provided from the SBC BOCs to their section 272 affiliates but not

⁴⁸ See *Section 272(d) Audit Order*, 17 FCC Rcd at 1381-82, ¶¶ 16-19.

⁴⁹ See *National Exchange Carrier Association, Inc., et al., Requests for Confidential Treatment of Certain Financial Information*, Memorandum Opinion and Order, 5 FCC Rcd 7184 (1990) (*NECA Order*); *BellSouth Corp., BellSouth Telecommunications, Inc. Request for Confidential Treatment of Certain Financial Information and Release of Audit Findings*, AAD 93-127, Memorandum Opinion and Order, 8 FCC Rcd 8129 (1993); *Bell Telephone Operating Companies, Requests for Confidential Treatment of Certain Commercial and Financial Information and Release of Summary of Audit Findings*, 10 FCC Rcd 11541 (1995). In the recent *Qwest* case, the Court of Appeals for the D.C. Circuit affirmed the Commission’s authority to release audit data under section 220 of the Act. *Qwest Communications International, Inc. v. FCC*, 229 F.3d 1172 (2000). The court did find, however, found that the Commission did not sufficiently explain its rationale for disclosing “raw audit data.” See *id.* at 1173. Raw audit data meant individual assets and their costs, as recorded in the carriers’ books. See *id.* at 1175.

⁵⁰ There is an exception where the independent auditor identified customer and vendor names. See SBC Redacted Section 272 Audit Report at 39, Attachment A-2. We will not require disclosure of these items as they have no bearing on SBC’s compliance with section 272.

⁵¹ See, e.g., *Africa Fund v. Mosbacher*, No. 92-289, 1993 WL 183736, at *8 (S.D.N.Y. May 23, 1993) (rejecting argument that exemption is permanent because “[w]hat today may be deemed . . . a ‘trade secret’ quite conceivably may be of little consequence tomorrow”); *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y. 1996) (potential harm caused two-year-old information “would seem likely to have mitigated with the passage of time”).

⁵² *SBC Section 272(d) Audit Report* at 2, 3.

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 16, 23.

made available to third parties;⁵⁵ the dollar value of certain services provided by the section 272 affiliate to an SBC BOC for certain months;⁵⁶ the dollar value of services provided by an SBC BOC to a section 272 affiliate, but not disclosed to the independent auditor for testing purposes;⁵⁷ the dollar value and sample size of invoiced exchange access services and facilities for January 2001;⁵⁸ the dollar value of invoices from the SBC BOCs for which SBC's section 272 affiliate could not provide documentation;⁵⁹ revenue fluctuations for certain services during a four-month period;⁶⁰ the dollar value of discrepancies between the amount the BOCs recorded for providing certain telecommunications services to their section 272 affiliates and the amount paid by the affiliates;⁶¹ the dollar value of disputed charges between the SBC BOCs and their section 272 affiliates;⁶² the dollar value of certain tariffed services provided to an unaffiliated telecommunications carrier;⁶³ a comparison of the billing and collection rates between SBC's section 272 affiliate and unaffiliated carriers;⁶⁴ the dollar value of certain affiliate transactions noted in the comments of the joint Federal/State audit team.⁶⁵

18. We note that in its initial confidentiality request SBC did not attempt to support its claim of confidentiality for each redacted item. Instead, SBC argued generally that disclosure would impair the Commission's ability to conduct audits, that disclosure would reveal SBC's marketing plans and operational details for offering long distance service, and that competitors could "see the underlying costs" incurred by SBC's long distance affiliates.⁶⁶ In addition, SBC argued that competitors could "discover specific details that indirectly impact how timely the affiliates provide services to customers and the quality of service offered."⁶⁷ On March 19, 2002, SBC supplemented its confidentiality request with additional arguments. SBC states that the Commission staff informed SBC that information arising out of the section 272(d) that SBC claimed as confidential or proprietary would be struck from the final audit report.⁶⁸ SBC further argues that the information at issue is specific, commercially sensitive information that is exempt from disclosure under the FOIA.⁶⁹ Finally, SBC provides a matrix that presents, on an item-by-item basis, SBC's argument that the redacted information is not relevant to the section 272(d) audit objective and SBC's explanation for how disclosure would cause "actual or potential competitive harm."⁷⁰

19. We disagree with SBC that the financial and accounting information in the audit report is

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 21.

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 32.

⁵⁹ *Id.* at 33.

⁶⁰ *Id.* at 34-36.

⁶¹ *Id.* at 37.

⁶² *Id.* at 37.

⁶³ *Id.* at 39.

⁶⁴ *Id.* at Attach. A-5a, A-5b, A-5c.

⁶⁵ *Id.* at Attach B-1, 1-2.

⁶⁶ *See generally* SBC December 17, 2001 Confidentiality Request.

⁶⁷ *Id.*

⁶⁸ SBC Supplemental Confidentiality Request at 3-4, n.12.

⁶⁹ *Id.* at 7-9.

⁷⁰ *Id.* at Attachment.

highly specific data that could cause substantial competitive harm to SBC.⁷¹ None of the information represents individual accounting entries; rather, it is accounting information accumulated over the course of the one-year audit period and represents many individual transactions. Aggregated information uncovered during audits, as the Commission has held previously, mitigates the likelihood of causing substantial competitive harm.⁷² Aggregated information of this nature does not allow competitors to gain insight into marketing plans, etc. The section 272(d) audit report does not, however, contain any “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁷³ Nor does the report contain technical documentation detailing how SBC employees should operate SBC’s computer systems, marketing surveys, plans for new products or services, memoranda describing technical assessments or evaluations of different vendor systems, customer lists, or detailed instructions or the source code needed for programming SBC’s computer systems. We further find that SBC has not adequately explained how disclosure would be likely to cause it substantial competitive harm.⁷⁴ In brief, nothing about SBC’s section 272(d) audit report would allow a competitor to provide interLATA telecommunications service more efficiently or obtain SBC’s customers.⁷⁵ We address each category of financial and accounting information below.

20. *Fixed Asset Listing.* SBC seeks confidential treatment for the total dollar value of assets owned by its section 272 affiliates.⁷⁶ SBC argues that the asset listing is confidential because SBC’s competitors are not required to disclose comparable information. We disagree. We note that the information is aggregated. The report only contains the total value of the assets; the report contains no details such as the cost of individual assets. We therefore find that disclosure of the fixed asset listing is not likely to cause SBC substantial competitive harm.

21. *Accounts Payable of Section 272 Affiliates.* SBC argues that disclosing the accounts payable from its section 272 affiliates to its BOCs “could show the extent of services purchased” by the affiliates and indicate the “sales volumes and markets being targeted.”⁷⁷ We disagree. The accounts payable information neither indicates sales volumes nor suggests which markets SBC is targeting to sell its long distance service. The balances are aggregated by section 272 affiliate and BOC and could not provide insight into specific services the section 272 affiliates provide. Further, these amounts represent accounts payable at a single point in time; they do not disclose total sales volumes for specific services. Even if the accounts payable information did show sales volumes or indicate SBC’s target markets, it is not clear from SBC’s initial and supplemental requests how disclosure could cause substantial competitive harm. In addition, the information is aggregated at the state level, and does not detail activity on an account-by-account or service-by-service level. We therefore find that disclosure of the accounts payable of SBC’s section 272 affiliates is not likely to cause SBC substantial competitive harm.

22. *Total Billings For Services Not Made Available to Third Parties.* SBC argues that disclosing the total dollar value for services not made available to third parties would cause competitive harm by revealing the section 272 affiliate’s “level of marketing expenses” and allow competitors to

⁷¹ We stress that nothing about this decision releases the independent auditor’s workpapers, which contain more detailed, disaggregated information than the audit report.

⁷² See *Confidential Treatment Policy* at ¶ 55.

⁷³ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

⁷⁴ See 47 C.F.R. § 0.459(b)(5).

⁷⁵ As discussed below, we do find that some customer information could be disclosed through the audit report, and do not therefore require disclosure of that information.

⁷⁶ See SBC Redacted Audit Report at 2-3. We note that the independent auditor included the information in the report only because SBC could not prove that the assets were not owned jointly with the SBC BOCs.

⁷⁷ *Id.* at Attachment, 2 (addressing SBC Section 272(d) Audit Report at 10).

“check the rates and make assumptions regarding sales volumes in relation to marketing costs.”⁷⁸ We disagree for two reasons. First, as noted above, the information is highly aggregated (beyond the state level), so that it only shows the total billings for a nine-month period by affiliate. The audit report does not contain, for example, marketing expenses related to specific product offerings. Second, SBC has not made clear how disclosure would cause it substantial competitive harm, *i.e.*, how a competitor “mak[ing] assumptions regarding sales volumes in relation to marketing costs” would cause substantial competitive harm. We therefore find that disclosure of the total billings for services not made available to third parties is not likely to cause SBC substantial competitive harm.

23. *Services Provided Between SBC’s Section 272 Affiliate and the SBC BOCs.* SBC argues that disclosing the dollar value of telecommunications services billed by the section 272 affiliate to the BOC, and the amount paid by the BOC for such services, would allow competitors to “determine the exact extent and nature of competitive services provide by the 272 affiliates.”⁷⁹ Similarly, SBC argues that disclosing the dollar value of local telecommunications services purchased by its section 272 affiliate from the SBC BOCs would reveal the “extent and location of 272 affiliate operations.” SBC also contends that the total amounts charged by the SBC BOCs for exchange access services provided to the section 272 affiliates “reveals potentially competitive marketing information,” disclosure of which could result in “unnecessary and unjustified concern on the part of non-affiliated entities.”⁸⁰ We note, however, that SBC itself already advertises the availability and details of the competitive services provided by its long distance affiliates.⁸¹ In addition, SBC discloses similar (although more aggregated) information pursuant to the Commission’s Part 32 affiliate transactions rules and Part 43 reporting requirements.⁸² We disagree that disclosure would likely pose substantial competitive harm. The information in the audit report merely informs the reader of potential discrepancies between the amount billed by SBC’s section 272 affiliate and the amount paid by the BOC. This information is needed to evaluate whether the BOC is adhering to the Commission’s rules intended to ensure the relationship takes place at arm’s length, but does not appear to provide any competitive advantage to SBC’s competitors.⁸³ Finally, we conclude that neither SBC’s initial confidentiality request nor subsequent filing adequately explains how disclosure could cause substantial competitive harm. We therefore find that disclosure of the dollar value of services provided between SBC’s section 272 affiliate and the SBC BOCs is not likely to cause SBC substantial competitive harm.

24. *Revenues for Incidental InterLATA Services.* SBC argues that disclosing the revenue

⁷⁸ *Id.*

⁷⁹ *Id.* at Attachment, 3.

⁸⁰ SBC also argues that competitors “can use tariff rates and determine the 272 affiliate’s minutes of use and other sales and volume information, thus gaining useful information about the extent of the 272 affiliate’s operations.” It is not at all clear from SBC’s request, however, precisely how a competitor could use this information to obtain a competitive advantage by, for example, providing interLATA telecommunications service more efficiently.

⁸¹ See, e.g., http://www.swbell.com/Products_Services/Business/Catalog/1,1965,17-0-6-1-17,00.html (visited July 18, 2002); *Niagra Mohawk Power Corp. v. United States Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1998) (Exemption 4 cannot be used to protect information already in the public domain); *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990) (“[N]o meritorious claim of confidentiality” can be made if information is in the public domain).

⁸² See 47 C.F.R. §§ 32.27, Part 43; <http://www.fcc.gov/wcb/armis/instructions/>. SBC’s asset and services affiliate transactions appear in Automated Reporting Management Information System (ARMIS) Report 43-02 (Uniform Systems of Accounts Report), Tables B-4 (Analysis of Assets Purchased From or Sold to Affiliates) and I-2 (Analysis of Services Purchased From or Sold to Affiliates).

⁸³ In particular, the Commission’s Part 32 affiliate transactions rules establish a specific hierarchy for recording the costs of transactions between a BOC and its section 272 affiliate. See 47 C.F.R. § 32.27. For tariffed telecommunications services (such as those listed in Table 6 of the SBC Section 272 Audit Report), the BOC must record the cost of these transactions at the tariffed rates.

amounts for incidental interLATA services would reveal “detailed revenue information about the specific lines of BOC competitive businesses.”⁸⁴ We disagree. The revenue information for certain services is highly aggregated into three categories, *i.e.*, amounts for Southwestern Bell, all the former Ameritech states, and Pacific Bell. Further, these aggregated revenues provide no transaction detail, such as the amount SBC charges specific customers for these services, the associated volumes of use, or the marketing costs associated with these services. Further, SBC has not explained why disclosure of this information is likely to cause it substantial competitive harm. We therefore find that disclosure of the revenues for incidental interLATA services is not likely to cause SBC substantial competitive harm.

(ii) Performance Data

25. SBC requests confidential treatment for the performance data gathered to demonstrate its compliance with section 272(e) for two reasons. First, SBC argues that disclosure could allow its competitors to “discover specific details that indirectly impact how timely the affiliates provide services to customers and the quality of service offered.”⁸⁵ Second, SBC argues that the information is irrelevant, containing only “[m]eaningless variances . . . that could have unnecessary negative consequences for SBC and may result in unnecessary and unjustified concern on the part of non-affiliated entities as well as other parties (*e.g.*, regulators).”

26. We reject SBC’s request for confidential treatment for two reasons. First, the performance data at issue is summary information aggregated between the categories “BOC and Affiliates” and “Non-Affiliates.” The performance data is also aggregated at the state level. As with the financial information in the audit report, these data do not represent individual transactions, but are a roll-up of a number of transactions. Thus, a competitor could not use this performance data to identify a specific SBC customer in a specific market to provide a targeted service offering. Nor could an SBC competitor use these data to provide interLATA telecommunications service more efficiently; the performance data does not (by itself or in conjunction with any other information) provide competing carriers with more efficient methods for serving customers or with the information needed to develop an innovative new telecommunications service offering. Thus, disclosure of the performance data does not pose substantial competitive harm to SBC. We also note that SBC, along with the other largest incumbent local exchange carriers, regularly submit similar performance data publicly to the Commission in various contexts.⁸⁶

27. Second, SBC’s request does not provide adequate grounds for granting confidential treatment of these performance data. Embarrassing facts, “unnecessary negative consequences for SBC,” or “unnecessary and unjustified concern” on the part of regulators do not constitute grounds for exempting information from disclosure.⁸⁷

28. We are concerned with SBC’s contention that these performance data are irrelevant for assessing its compliance with section 272(e). Indeed, in the *SWBT Texas § 271 Order*, SBC submitted affidavits that contained the reporting format it planned to use to demonstrate compliance with the section 272(e) nondiscrimination safeguards.⁸⁸ In fact, the Commission relied on SBC’s representations to make an affirmative finding that SBC demonstrated compliance with section 272 during the section 271

⁸⁴ *Id.* at Attachment, 4.

⁸⁵ *SBC December 17, 2001 Confidentiality Request* at 4.

⁸⁶ See, *e.g.*, <http://www.fcc.gov/wcb/armis/>. These are performance data that SBC submits into the Commission’s ARMIS system. See 47 C.F.R. § 43.21.

⁸⁷ See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987).

⁸⁸ *SWBT Texas § 271 Order* at ¶ 412, n.1198.

application process.⁸⁹ Because the Commission has already concluded that the data contained in the SBC Section 272(d) Audit Report are useful for evaluating compliance with section 272(e), we reject SBC's arguments based on the relevancy of this information for the purposes of this audit. In sum, we find that disclosure of SBC's performance data is not likely to cause SBC substantial competitive harm.

(iii) Other Commercial Information

29. *Leases.* SBC seeks confidential treatment for the number of, and total dollar value of, leases entered into by SBC's section 272 affiliates that are greater than \$500,000 per year.⁹⁰ SBC argues that this information is confidential because its competitors are not required to reveal the same information and because the information would give its competitors insight into its strategies to lease versus own office space. We disagree. The lease information is highly aggregated; the audit report does not disclose what is being leased, the location, or the terms of the transactions. The audit report does not disclose any leases under the \$500,000 threshold, or reveal the affiliates' lease versus buy decisions for individual markets. Thus, we find that disclosure is not likely to cause SBC substantial competitive harm.

30. *Business Locations.* We likewise find that the information about the business locations of SBC's section 272 affiliates is summary-level and that disclosure does not pose substantial competitive harm nor a security risk to SBC.⁹¹ This information includes only the number of section 272 affiliate employees by geographical location and general department. This is summary information because it does not, for example, reveal how many employees SBC has devoted to marketing specific services, their individual qualifications, or SBC's hiring criteria. Nor does the information reveal specific employee information such as names or positions. As a result, we find that a competitor could not use this information to build its own marketing plan to steal customers from SBC. We therefore find that disclosure of SBC's section 272 business locations is not likely to cause SBC substantial competitive harm nor pose a security risk.

31. *Bonus Calculation.* SBC argues that the bonus calculation formula is confidential because "businesses generally do not reveal how they pay bonuses."⁹² We disagree. First, we note that SBC has not shown with particularity how a competitor could use the bonus calculation information to harm SBC. Second, the calculation does not appear to reveal the bonus calculation for any individual employee or to provide enough specificity for competitors to ascertain SBC's compensation methods. As a result, the information does not reveal SBC's calculation for specific employees. We further find that the information is relevant for determining whether the performance of managers of SBC's section 272 affiliates is tied to the performance of the SBC BOCs, *i.e.*, whether there is operational independence between the companies. We therefore find that disclosure of the bonus calculation is not likely to cause SBC substantial competitive harm.

32. *Vendor and Other Party Names.* For the two types of information at issue here, *i.e.*, the name of an SBC carrier customer and the names of vendors from whom SBC buys certain services, SBC argues that it would be inappropriate to disclose customer names,⁹³ and it has a contractual obligation "to not reveal vendor names and other vendor information."⁹⁴ We agree. Unlike the other categories of

⁸⁹ Pursuant to section 271(d)(3)(B), the Commission shall not approve a BOC's section 271 application unless it finds, among other things, that the authorization "will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B).

⁹⁰ See SBC Redacted Audit Report at 5, 10.

⁹¹ See SBC March 19, 2002 Supplemental Confidentiality Request at 6, Attachment, 6.

⁹² See SBC March 19, 2002 Supplemental Confidentiality Request at Attachment, 1.

⁹³ *Id.* at Attachment, 5.

⁹⁴ *Id.* at Attachment, 6

redacted information, this contains the names of specific unaffiliated parties. We recognize the substantial competitive harm that could result if the names of SBC business partners were disclosed involuntarily. In addition, we do not see how company names, as opposed to underlying facts that might suggest possible discrimination, are relevant to SBC's compliance with section 272 and the Commission's rules. Because of our conclusion that this information is not relevant to the subject of the audit, we need not reach whether, despite any competitive harm, it must nevertheless be made publicly available under the *Section 272(d) Audit Order*. As a result, we grant SBC's request for redaction of SBC customer and vendor names.

(iv) Public Interest

33. In addition to the two prongs of the *National Parks* test, the Commission has historically applied a public interest test to determine whether audit information should be made public.⁹⁵ We find that the public interest would be served by release here. Public disclosure of the audit results will promote meaningful comment on the audit results pursuant to section 272(d)(2) and thereby help the Commission to determine whether SBC has complied with section 272 and the Commission's implementing rules. We note that Verizon's section 272 audit report drew comments from two of the largest long-distance competitors, AT&T and WorldCom.⁹⁶ Many of these comments focused on information similar to that SBC seeks to shield here, *e.g.*, section 272(e)(1) performance data. We also note that the Commission has indicated in its past 0.459 decisions that the public interest test is met when the information at issue could form the basis of an enforcement action.⁹⁷ SBC's audit results here, as carrier audit results elsewhere, could form the basis of enforcement actions. Finally, we find that the audit results here may be relevant to parties commenting on the Commission's *Separate Affiliate Sunset NPRM*.⁹⁸

34. SBC argues that the redacted audit report contains all information necessary for parties to judge SBC's compliance with section 272. Stated differently, SBC argues that the redacted information would add nothing to parties' evaluation of SBC's section 272 compliance. We disagree.⁹⁹ We find it significant that the information SBC redacted from its audit report is substantially the same as that Verizon redacted from its audit report.¹⁰⁰ After disclosure of all Verizon's audit information, parties filed comments, *e.g.*, on Verizon's section 272(e)(1) performance data.¹⁰¹ The redacted information bears directly on SBC's compliance with, *inter alia*, the section 272(b)(1) requirement to operate independently,¹⁰² the section 272(b)(3) requirement to use separate employees,¹⁰³ the section 272(b)(4) requirement addressing credit arrangements,¹⁰⁴ the section 272(b)(5) and (c)(2) accounting

⁹⁵ See *Confidential Treatment Policy* at ¶ 53.

⁹⁶ See Comments of AT&T and WorldCom in CC Docket No. 96-150 (filed April 8, 2002).

⁹⁷ See *NECA Order* at ¶ 7.

⁹⁸ See n.46 *supra*.

⁹⁹ We disagree except for the limited category of vendor and other company names described above. See ¶ 32 *supra*.

¹⁰⁰ For example, the section 272(e)(1) performance data is similar in SBC's and Verizon's audit reports. Verizon's report contains the performance data for Verizon (including Verizon affiliates) and non-affiliates, for regular and high-speed services. See Verizon section 272 audit report at Appendix A, Tables 14(a), 14(b), and 14(c). SBC's report divides the data between SBC (including SBC affiliates) and non-affiliates, for DS-0, DS-1, and DS-3 services. See SBC Redacted Section 272 Audit Report at Attachment A-7.

¹⁰¹ See n.96 *supra*.

¹⁰² See *id.* at 1-2.

¹⁰³ See *id.* at 5-9.

¹⁰⁴ See *id.* at 9.

requirements,¹⁰⁵ the section 272(c)(1) nondiscrimination safeguards,¹⁰⁶ and the section 272(e) nondiscrimination safeguards.¹⁰⁷

35. Finally, we reject SBC's request to limit access to the audit information with a Protective agreement. As the Commission has stated previously, protective agreements should not be used for otherwise unprotected information.¹⁰⁸ And, as we noted in the *Verizon Section 272 Audit Reconsideration Order*, protective agreements necessarily limit access to information.¹⁰⁹

36. For the foregoing reasons, we decline to grant SBC's request for confidential treatment of the information contained in the final section 272(d) audit report.

III. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 220, and 272(d) of the Act, 47 U.S.C. §§ 4(i), 220, and 272(d), that SBC's request for confidential treatment of the section 272(d) audit report, as noted and described herein, IS DENIED for the reasons indicated in this Order.

38. IT IS FURTHER ORDERED, pursuant to sections 4(i), 220, and 272(d) of the Act, 47 U.S.C. §§ 4(i), 220, and 272(d), that SBC's independent auditor file the unredacted version of SBC's final section 272(d) audit report in this docket, without restrictions as to disclosure, within ten days, subject to paragraph 39 below.

39. IT IS FURTHER ORDERED, pursuant to 0.459(g) of the Commission's rules, 47 C.F.R. § 0.459(g), that SBC has five working days from telephone notice of this decision to seek a judicial stay of this decision. If SBC seeks a judicial stay, the information in the section 272(d) audit report for which confidentiality is requested will be treated as confidential until the court acts on such a stay request.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰⁵ See *id.* at 10-22.

¹⁰⁶ See *id.* at 23-28.

¹⁰⁷ See *id.* at 29-30, Attachment A-7; *Section 272(d) Audit Order* 17 FCC Rcd at 1377-78, ¶ 8.

¹⁰⁸ See *Confidential Treatment Policy* at ¶ 22.

¹⁰⁹ See *Section 272(d) Audit Order on Reconsideration* at ¶ 3.